

United Food & Commercial Workers Union District Local 22 (Excel Corporation) and Lynn E. Theisen. Case 17-CB-3615

March 29, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

Upon a charge filed by Lynn E. Theisen, an individual, on December 7, 1988, the General Counsel of the National Labor Relations Board issued a complaint on February 13, 1989, against United Food & Commercial Workers Union District Local 22, the Respondent, alleging that it has violated Section 8(b)(1)(A) of the National Labor Relations Act. Copies of the charge and complaint and notice of hearing were served on the parties. On March 6, 1989, the Respondent filed an answer to the complaint and, on March 27, 1989, it filed an amended answer denying the commission of any unfair labor practice and raising affirmative defenses.

On April 10, 1989, the parties filed a stipulation of facts and motion to transfer the case to the Board. The parties agreed that the stipulation of facts and attached exhibits shall constitute the entire record in this case, and that no oral testimony was necessary or desired by any of the parties. The parties further waived a hearing before an administrative law judge, the issuance of an administrative law judge's decision, and submitted the case directly to the Board for findings of fact, conclusions of law, and a Decision and Order.

On June 14, 1989, the Board issued its order approving the stipulation and transferring the proceeding to the Board. Thereafter, the General Counsel and the Respondent filed briefs in support of their positions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the stipulation and its exhibits, the briefs, and the entire record in this proceeding, and hereby makes the following

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

Excel Corporation, with an office and place of business in Schuyler, Nebraska, is engaged in the business of processing and distributing beef. During calendar year 1988, the Employer, in the course and conduct of its business operations, purchased and received at its Schuyler, Nebraska facility products, goods, and materials valued in excess of \$50,000 directly from points outside the State of Nebraska. During that same period, the Employer, in the course and conduct of its business operations, also sold and shipped from its Schuyler,

Nebraska facility products, goods, and materials valued in excess of \$50,000 directly to points outside the State of Nebraska. We find that Excel Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

We find that the Respondent, United Food & Commercial Workers Union District Local 22, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Stipulated Facts

The Respondent and the Employer were parties to a collective-bargaining agreement that was effective from June 29, 1987, until October 28, 1990. Article 3, paragraph 3.01 of that contract reflects the parties' agreement for deduction of union dues. On May 4, 1987, the Employer hired Lynn E. Theisen, the Charging Party, for a bargaining unit position at its facility in Schuyler, Nebraska. The State of Nebraska, as permitted by Section 14(b) of the Act, has a right-to-work law that prohibits the inclusion of union-security clauses in collective-bargaining agreements.

On July 28, 1987, the Charging Party voluntarily signed a union membership application and a dues-checkoff authorization form directing the Employer to deduct from her wages "all Union dues and initiation fees" owed to the Respondent Union. The authorization provided that it would be "irrevocable for a period of one year from the date of execution or until the termination date of the agreement between the Employer and the [Union], whichever occurs sooner, and from year to year thereafter"¹

On September 14, 1988, the Charging Party executed a written statement at the Respondent's office, in view of the Respondent's secretary-treasurer, Rick Saalfeld, resigning her union membership and seeking to revoke her dues-checkoff authorization. The Charging Party then handed this written statement to the Respondent's secretary. The Respondent sent the Charg-

¹ The authorization in its entirety reads as follows:

To the employer:

You are hereby authorized and directed to deduct from my wages, commencing with the next pay period, all Union dues and initiation fees as shall be certified by the Secretary-Treasurer of Local 22, United Food and Commercial Workers International Union, AFL-CIO, and to remit same to the said Secretary-Treasurer.

This authorization and assignment shall be irrevocable for a period of one year from the date of execution or until the termination date of the agreement between the Employer and Local 22, which ever occurs sooner, and from year to year thereafter unless, not less than thirty (30) days and not more than forty-five (45) days prior to the end of any subsequent yearly period, I give the Employer and the Union written notice of revocation bearing my signature.

The Secretary-Treasurer of Local 22 is authorized to deposit this authorization with any Employer under contract with Local 22, and is further authorized to transfer this authorization to any other Employer under contract with Local 22 in the event I should change employment.

ing Party a letter on September 22, 1988, acknowledging her resignation, but also informing her that she was not eligible to revoke her dues-checkoff authorization until the time period of June 13 through June 28, 1989.

It was the Employer's practice, during the term of the collective-bargaining agreement, to continue deducting union dues from employees' pay pursuant to checkoff authorizations until the Respondent notified it to cease deductions for any particular individual. Since the Charging Party resigned on September 14, 1988, the Respondent has not notified the Employer to cease deducting union dues from her paycheck. The Respondent, which uses the dues-checkoff authorizations in determining its annual budget, since that date has continued to accept union dues checked off from the Charging Party's paycheck and forwarded to it by the Employer.

B. Contentions of the Parties

The General Counsel, relying on *Pattern Makers League v. NLRB*, 473 U.S. 98 (1985), and *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330, 1333 (1984), argues that the Charging Party clearly resigned her union membership by submitting to the Respondent a letter stating her intent to resign. Despite the language in the printed checkoff authorization specifying particular time periods during which the signatory may revoke the authorization, the General Counsel asserts that the use of this authorization to extract money from an employee who has resigned union membership is in essence an attempt to frustrate the employee's right to resign and, therefore, violates the Act's policy of voluntary unionism that the Supreme Court recognized in *Pattern Makers*.

The General Counsel stresses that this approach is different from the Board's "contract" theory which it first expressed in *Carpenters (Campbell Industries)*, 243 NLRB 147 (1979). The General Counsel notes that in *Campbell Industries* and subsequent cases the Board held that resignation from union membership will by operation of law revoke a checkoff authorization where the wording of that authorization clearly shows that the signer is executing the authorization in consideration for the benefits of union membership. Since the contract between the Respondent and the Employer here does not contain a union-security clause, the General Counsel contends that the implication arises that the payment of dues was in consideration for the privileges of union membership. The General Counsel further argues that, even if the Board finds that its contract analysis is not applicable to the checkoff authorization the Charging Party signed, her right to resign and sever financial ties to the Union was of paramount importance and overrode her promise to have dues deducted for specified periods. Thus, the General Counsel urges the Board to find that, re-

gardless of the language set forth in the checkoff authorization, the Charging Party's valid resignation from the Union operated to revoke the dues-checkoff authorization which constituted an unlawful restriction on her right to resign.

In the alternative, the General Counsel contends that, even if the Charging Party's resignation from union membership did not also automatically revoke her checkoff authorization, resignation nonetheless reduced the amount she properly owed as union membership dues to zero. The General Counsel claims that, under this view, the receipt and acceptance by the Respondent of any moneys exceeding that amount are unlawfully extracted.²

The Respondent urges the Board to dismiss the complaint because the Charging Party, by resigning from the Union, did not effectively revoke her checkoff authorization under the express terms of the agreement she signed. The Respondent claims that the General Counsel's position here lacks merit under basic contract principles because it ignores the plain language of the checkoff authorization which permits revocation only once annually during a specific 15-day period. Further, according to the Respondent, the General Counsel misperceives the full consideration which the Charging Party received in exchange for the authorization. The Respondent notes that, in addition to the benefits of union membership, the Charging Party also enjoyed the convenience of paying her union financial obligations without making a monthly visit to its union hall. Finally, the Respondent stresses that, as the Ninth Circuit remarked in *NLRB v. Postal Service*, 827 F.2d 548, 554 (9th Cir. 1987), there has been no failure of consideration here because the General Counsel has not demonstrated that either the Respondent or the Employer was unable or unwilling to continue providing the benefits the Charging Party contracted for when she executed the dues-checkoff authorization.

The Respondent further contends that, besides lacking support in contract law, the General Counsel's position here also is not justified by the policies and purposes of the Act. The Respondent urges the Board to balance properly the Respondent's significant interest in enforcing the Charging Party's checkoff authorization against any minimal interference with her statutory rights resulting from enforcement of that authorization. In this regard, the Respondent emphasizes that it relies on the express terms of the checkoff authorization concerning irrevocability for budgeting and planning its activities on behalf of the employees it represents. This is particularly true, the Respondent notes, in the State of Nebraska where it cannot lawfully enter into a con-

²In making this argument, the General Counsel relies on the view of former Member Johansen, expressed in *Postal Service*, 279 NLRB 40, 42 fn. 5 (1986), remanded 827 F.2d 548, 555 (9th Cir. 1987).

tract containing a union-security clause. Because Section 302(c)(4) of the Act guarantees an employee the right to revoke a checkoff authorization at least once per year or upon termination of the relevant collective-bargaining agreement, the Respondent claims that, for the above reasons, its interest in representing the bargaining unit as a whole outweighs any right the Charging Party had to revoke her dues-checkoff authorization. Accordingly, the Respondent urges the Board to find that its conduct here did not, as alleged, violate Section 8(b)(1)(A) of the Act.

C. Discussion and Conclusions

In *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*,³ the Board acknowledged judicial criticism of its rule regarding the impact of employee resignations from union membership on dues-checkoff authorizations,⁴ and set forth a new test for determining the effect of an employee's resignation from union membership on that employees' dues-checkoff authorization. The Board in *Lockheed* found that an employee may voluntarily agree to continue paying dues pursuant to a checkoff authorization even after resignation of membership. In fashioning a test to determine whether an employee has in fact agreed to do so, the Board recognized the fundamental policies under the Act guaranteeing employees the right to refrain from belonging to and assisting a union, as well as the principle set forth by the Supreme Court that waiver of such statutory rights must be clear and unmistakable.⁵ In order to give full effect to these fundamental labor policies, the Board stated that it would:

construe language relating to a checkoff authorization's irrevocability—i.e., language specifying an irrevocable duration for either 1 year from the date of the authorization's execution or on the expiration of the existing collective-bargaining agreement—as pertaining only to the *method* by which dues payments will be made *so long as dues payments are properly owing*. We shall not read it as, by itself, a promise to pay dues beyond the term in which an employee is liable for dues on some other basis. Explicit language within the checkoff authorization clearly setting forth an obligation to pay dues even in the absence of union membership will be required to establish that the employee has bound himself or herself to pay the dues even after resignation of membership. [*Id.* at 328–329.]⁶

³ 302 NLRB 322 (1991).

⁴ See *NLRB v. Postal Service*, 833 F.2d 1195 (6th Cir. 1987); *NLRB v. Postal Service*, 827 F.2d 548 (9th Cir. 1987).

⁵ *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

⁶ In *Lockheed*, the Board left open the question of how its waiver rule would apply in the context of a lawful union-security provision. In the absence of a union-security clause requiring union membership here, the *Lockheed* test is applicable to this case.

Applying the analysis of *Lockheed* to the stipulated facts in this case, we find that the Respondent has failed to show that the dues-checkoff authorization the Charging Party signed obligated her to pay dues after she effectively resigned her union membership. As in *Lockheed*, all that the Charging Party clearly agreed to do was to allow certain sums to be deducted from her wages and remitted to the Respondent Union for payment of her “Union dues and initiation fees.” The Charging Party did not clearly agree to have deductions made even after she had submitted her resignation from union membership. We therefore find that these partial wage assignments made by the Charging Party were conditioned on her union membership and were revoked when she ceased being a union member.

Thus, we conclude that the Respondent Union has restrained and coerced the Charging Party in the exercise of her Section 7 rights by refusing to accept her revocation request and by accepting moneys checked off from her wages after she had communicated her intent to resign union membership and to revoke her authorization. Accordingly, we find that the Respondent Union has violated Section 8(b)(1)(A) of the Act.

CONCLUSION OF LAW

By refusing to honor the revocation of dues-checkoff authorization executed by Lynn E. Theisen when she voluntarily resigned membership in the Union, where the terms of the voluntarily executed checkoff authorization did not clearly and explicitly impose any postresignation dues obligation on this employee, and by accepting moneys checked off from the pay of Lynn E. Theisen after her resignation from membership in the Union, the Respondent Union has restrained and coerced employees in the exercise of their Section 7 rights and has violated Section 8(b)(1)(A) of the Act.

REMEDY

Having found that the Respondent has engaged in the unfair labor practice described above, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, we shall require that the Respondent give full force and effect to the Charging Party's resignation from membership in the Union and revocation of her dues-checkoff authorization, and make her whole for any moneys deducted from her wages following the date of her resignation, September 14, 1988, with interest.

ORDER

The National Labor Relations Board orders that the Respondent, United Food & Commercial Workers Union District Local 22, Schuyler, Nebraska, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to honor the revocation of dues-check-off authorizations executed by employees who have resigned their membership in the Union, where the terms of the voluntarily executed checkoff authorizations did not clearly and explicitly impose any postresignation dues obligation on the employees, and accepting moneys checked off from wages as membership dues after such employees have resigned their membership in the Union.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole, with interest, employee Lynn E. Theisen for all moneys checked off from her wages as union dues after the date of her resignation from union membership.

(b) Post at its Schuyler, Nebraska offices and, with permission, at the Employer's Schuyler, Nebraska facility copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁷If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to honor the revocation of dues-checkoff authorizations executed by employees who have resigned membership in the Union, where the terms of the voluntarily executed checkoff authorizations did not clearly and explicitly impose any postresignation dues obligation on employees, and

WE WILL NOT accept moneys checked off from wages as membership dues after such employees have resigned their membership in the Union.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole, with interest, employee Lynn E. Theisen for all moneys deducted from her wages as membership dues following her resignation from membership in the Union.

UNITED FOOD & COMMERCIAL WORKERS UNION DISTRICT LOCAL 22